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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/663,502	09/15/2003	Rickey Harvey	30137-CIP1	5249

23589 7590 11/29/2004  
HOVEY WILLIAMS LLP  
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EXAMINER


ADDIE, RAYMOND W

ART UNIT PAPER NUMBER

3671

DATE MAILED: 11/29/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/663,502	<b>Applicant(s)</b> HARVEY, RICKEY	
	<b>Examiner</b> Raymond W. Addie	<b>Art Unit</b> 3671	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 05 October 2004.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-27 is/are pending in the application.
- 4a) Of the above claim(s) 6-27 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 15 September 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>9/15/03</u> . | 6) <input type="checkbox"/> Other: _____  |

**DETAILED ACTION**

***Election/Restrictions***

1. Applicant's election of Group I, Claims 1-5 in the reply filed on 10/05/04 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)).
2. Newly submitted claims 20-27 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: New Claims 20-27 contain subject matter that was previously non-elected and hence are distinct from the invention originally claimed because Original Claims 1-5 did not include the subject matter of the newly filed claims

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 20-27 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

***Specification***

3. The abstract of the disclosure is objected to because it does not describe the claimed invention and rather is directed to other embodiments that are not germane to the claimed invention. ~~Correction is required. See MPEP § 608.01(b).~~
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The abstract of the disclosure is objected to because On page 16, ln. 27 the word "provided" is misspelled.

On Page 17, ln. 9 there are 2 periods ".." after the word "forward".

Correction is required. See MPEP § 608.01(b).

***Claim Rejections - 35 USC § 102***

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1- are rejected under 35 U.S.C. 102(b) as being anticipated by hall et al. #

6,290,428 B1.

Hall et al. discloses a crack sealing apparatus (10) comprising:

A frame (12) having handles (18, 33), wheels (20) and a motor (24).

An container (13) capable of containing an emulsion type roadway sealant (11).

A 1st lever (72) operable to control a selectively open able sealant outlet (67).

Wherein the selectively open able sealant outlet (67) further comprises a nozzle (66).

A 2<sup>nd</sup> lever (74) mounted on said handle (18) and being operatively connected to a cable (75) for opening and closing said selectively open able sealant outlet.

See cols. 5-8.

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5. Claims 1, 3, 5 are rejected under 35 U.S.C. 102(b) as being anticipated by Sterner # 5,354,145.

Sterner discloses a crack sealing apparatus comprising:

A frame (unnumbered, see figs. 3, 4).

An emulsion container (40) supported on the frame, and having a selectively opening sealant outlet, in the form of a nozzle (22).

A handle (10) extending from said frame.

A lever (16), located on said handle and operable to control the selectively open able sealant outlet (22).

A fill hopper (60).

A motor (58). See col. 3, ln. 65-col. 5, ln. 41.

### ***Claim Rejections - 35 USC § 103***

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over Sterner # 5,354,145 in view of Campbell # 5,851,085.

~~Sterner discloses a road maintenance apparatus having an emulsion container (40),~~

having a selectively open able outlet; and a fill hopper (60) for receiving sand or other types of aggregate. What Sterner does not disclose is the use of a hopper gate to open and close an outlet of said hopper. However, Campbell teaches that road maintenance apparatuses are desirably provided with a storage tank (300) for liquids, such as tack coats, and a hopper (16, 216) having an outlet opening (50) further comprising a feeder gate (60) that is selectively open able and close able to control the amount of fill material being dispensed from the hopper. Therefore, it would have been obvious to one of ordinary skill in the art, at the time the invention was made to provide the road maintenance apparatus having a fill hopper of Sterner, with a feeder gate, as taught by Campbell, in order to accurately dispense a fill material onto a roadway being repaired. See Sterner cols. 5-6; Campbell col. 4, Ins. 38-43.

### ***Conclusion***

7. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Trimble # 4,502,814 discloses a continuous crack and joint overlay. Warnock # 4,423,980 discloses a road repair machine.

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8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Raymond W. Addie whose telephone number is 703 305-0135. The examiner can normally be reached on 8-2, 6-8.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thomas B. Will can be reached on 703 308-3870. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



**Raymond Addie**  
**Patent Examiner**  
**Group 3600**

11/24/04

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